IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12069 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MONITRON SECURITIES PVT LTD

Versus

MUKUNDLAL KHUSHALCHAND DHAVAN

Appearance:

Ms.Pahwa, for M/S THAKKAR ASSOC. for Petitioner

MR GM JOSHI for Respondent No. 1

Mr.R.V. Desai, Assistant GOVERNMENT PLEADER, for Respondent No. 2

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 20/12/2000

ORAL JUDGEMENT

1. Rule. Mr.Joshi waives service of rule on behalf of the respondent.

By consent of the parties, the matter is heard today.

2. By the present petition, the petitioner is challenging the order passed by the Controlling Authority under the Payment of Gratuity Act passed in Application No.136 of 1996 as well as order of the Appellate Authority under the Act. The said orders are annexed at Annexure `D' with the present petition. The respondent herein had preferred an application, being Application No.136 of 1996, before the Authority under the Payment of Gratuity Act for getting the benefit of gratuity after his retirement from service. Before the Authority, it was the case of the present petitioner that the concerned employee, after completing 58 years of age on 1.4.1984, was continued as a Director of the Company and he had voluntarily retired on 30th June, 1996 and since he was a Director of the Company, he was not entitled to any gratuity as he himself was a part and parcel of the Management. Before the Authority, the Management had shown its willingness to pay the amount of gratuity from 1.4.1976 to 1.4.1984 as observed by the Authority in its order. However, according to the respondent, he was appointed from 1.4.1976 as a Branch Manager and, thereafter, he was serving as a General Manager in the Company since 1983. It was his say that he was never appointed as Managing Director of the Company, but in October, 1993, he was given promotion as a Director. He has clearly stated that from 1.4.1976 till February, 1996, one Mr.J.D. Nagarwala was the Managing Director of the Company. On the aforesaid basis, ultimately, order for payment of gratuity was made by the Controlling Authority and the said order was also confirmed in appeal by the Appellate Authority.

3. At the time of the hearing of this petition, Ms.Pahwa for the petitioner argued that the respondent was not a `workman' and he was an employer as such because he was a Director of the Company and, therefore, according to her, the respondent is not entitled to the benefit of payment of gratuity as gratuity is to be paid to the employee and not to the employer. However, she fairly submitted that the respondent was never appointed as Managing Director of the Petitioner. She has relied upon the decision of the Apex Court in J.K. Industries Ltd. and others v. Chief Inspector of Factories and Boilers and others, (1996) 6 SCC 665, which is in connection with the Factories Act.

4. Alternatively, it was argued by her that in any case, the respondent had completed 58 years of age in the

year 1984 and thereafter, he had continued in service upto 1996 after attaining the retirement age.

5. To the aforesaid contention, Mr.Joshi for the respondent has argued that there is a clear cut finding of fact given by the Authority in the order. The respondent was employed as a General Manager and he was drawing his salary as such and, therefore, he cannot be denied the benefit of gratuity under the Payment of Gratuity Act simply because some designation of `Director' was given to him. He had no control over the functioning of the Company in any manner and all throughout, he was working and getting fixed salary and he was discharging his duty as a General Manager and additional status, even if it is given, is not relevant for denying the aforesaid benefits. He further argued that so far as the superannuation is concerned, ultimately, he had retired from service in the year 1996 and, therefore, simply because he continued upto 1996, even after completing 58 years of age, it is no ground by which he can be denied benefit of gratuity.

6. On appreciation of facts, both the Authorities have found that a mere designation of `Director' was given to the respondent and he was not having any control over the Management of the Company and all the controls were with the Managing Director of the Company. On the aforesaid basis, it was found that the respondent was entitled to gratuity on the basis of his continuous service from 1.4.1976 to 30.6.1996 as there was no break in his service during that period. It is also required to be considered that the respondent herein had no ultimate control over the affairs of management and he was, all throughout, performing his duties and was getting salary for his work. It is not in dispute that he had never acted as a Managing Director and all the administrative decisions were in the hands of the management and, therefore, simply because he signed some papers as Director, that will not disentitle him from availing of the benefits of gratuity under the Payment of Gratuity Act. The petitioner cannot be said to be an employer / co-employer, as, even looking to the definition of `employer', if any person is having ultimate control of the affairs of the Company, he can be considered as employer. The petitioner was not having any such control in his hands and after considering the evidence on record, the authorities have come to the conclusion that the respondent was not having any such control and accordingly, he was entitled to benefit of gratuity under the Payment of Gratuity Act, 1972 as an

employee of the Company.

7. So far as the decision in J.K. Industries Ltd. and others v. Chief Inspector of Factories and Boilers and others, (1996) 6 SCC 665 is concerned, it was in connection with the provisions of the Factories Act and the question which was required to be considered by the Honourable Apex Court was whether in the case of a Company, which owns or runs the factory, is it only a Director of the Company, who can be notified as the `occupier' of the factory within the meaning of proviso (ii) to Section 2(n) of the Factories Act, or whether the company can nominate any other employee to be the occupier by passing a resolution to the effect that the said employee shall have "ultimate control over the affairs of the factory". It was found by the Honourable Supreme Court that only one of its Directors and none of its employees or officers can be nominated as occupier of the factory by such a Company. The direction of the Chief Inspector of Factories was that an employee other than a director, even if nominated by the Company as an occupier, could not file an application for renewal or grant of factory licence. The said provision was found to be valid. Examining the scheme of the amended Act, it was found by the Supreme Court that after 1987 amendment, the true import of proviso (ii) to Section 2(n) would be that in the case of a Company which owns a Factory, the Company cannot nominate any one of its employees and officers except Director of the Company as the occupier of the factory. This interpretation of an `occupier' would apply to all provisions of the Act wherever expression `occupier' is used and not merely for the purpose of Section 7 or Section 7A of the Act. Hence, the directions given by the Chief Inspector of Factories to the writ petitioners and the appellants to the effect that only a Director of the Company could file an application for renewal of the factory licence (or for grant of factory licence) as occupier of the factory and no other employee, could make such an application even if nominated by the Company as an occupier of the Factory suffer from no infirmity whatsoever. Under the Scheme of the Factories Act, therefore, the direction given by the Chief Inspector of Factories was found to be valid.

8. However, so far as the instant case is concerned, the question which is required to be considered is whether the respondent was an employee of the Company or not and looking to the reasoning given by both the Authorities to the effect that he had no ultimate control over the management and considering the definition of `employee' as well as `employer' given in the Act, I am

of the opinion that the view taken by the Authority is absolutely correct and no interference of this Court is required.

9. Mr.Joshi for the respondent argued that simply because nomenclature of `Director' was given to the respondent, he cannot be denied the benefit of payment of gratuity and, all throughout, he was working on a fixed salary and was discharging duty as General Manager and only that additional status was given to him and said additional status of `Director' cannot take away the benefit of gratuity which otherwise is required to be given to the respondent-employee. He further argued that on superannuation, he has retired in 1996 and, therefore, simply because he has continued upto 1996 after completing 58 years of age, is no ground to deny the benefit of gratuity.

10. After considering the aforesaid submissions of the parties and looking to the reasoning given by the Authorities, I am satisfied that no exception can be made to the view taken by the Authorities. I do not think that there is any substance in this petition. Considering pages 35 and 36 of the compilation, I cannot substitute the aforesaid finding of fact while deciding the Special Civil Application. The judgment of the Supreme Court which was cited by Ms.Pahwa was regarding the Factories Act and the scheme of that Act is absolutely different.

11. I find no substance in the petition and the same is dismissed. Rule is discharged. Interim relief stands vacated. No costs.

20th December, 2000 (P.B. Majmudar, J.)

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(apj)